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OCTOBER TERM, 1997

IN THE SUPREME COURT OF THE UNITED STATES

CASE NO. 97-1606

THOMAS A. FULCOMER, Warden
State Correctional Institution at Huntingdon,

Petitioner,

v.

RODERICK HERMAN FREY,

Respondent.

RESPONDENT'S MOTION AND AFFIRMATION FOR IN FORMA PAUERIS RELIEF AND FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, through counsel, respectfully moves for in forma pauperis relief and for leave to proceed in forma pauperis and in support of this applicaiton submits as follows:

1. This case is before the Court on a petition for writ of certiorari.

2. Respondent is indigent. He was found to be indigent and in forma pauperis relief was granted in the state courts. He was represented in the state courts by court appointed counsel.

3. Respondent is incarcerated and is without funds to secure the services necesssary to proceed in this court (e.g. printing fees, etc.) or to pay any fees.

29 pp

4. Counsel was appointed pursuant to 18 U.S.C. § 3006A by the Court below.

5. Counsel is a member of the bar of the Supreme Court of the United States.

WHEREFORE, the Respondent prays for leave to proceed in forma pauperis.

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Date: April 29, 1998

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October Term, 1997

THOMAS A. FULCOMER, Warden,
State Correctional Institution at Huntingdon,

Petitioner,

vs.

RODERICK HERMAN FREY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the United States Court of Appeals, reviewing a district court's habeas corpus decision, must *sua sponte* raise and decide whether a constitutional violation for which a habeas petitioner is entitled to relief on the merits constitutes a new rule of law under *Teague v. Lane*, 489 U.S. 288 (1989), where the State has waived the *Teague* non-retroactivity defense by failing to raise it in its briefs or in oral argument in the Court of Appeals?

2. Whether, after the Court of Appeals' careful review of the totality of the circumstances, it correctly applied *Mills v. Maryland*, 486 U.S. 367 (1988); *McKoy v. North Carolina*, 494 U.S. 433 (1990), and *Boyde v. California*, 494 U.S. 370 (1990), after determining that the jury instruction and verdict slip in this case created a reasonable likelihood that the jury must unanimously agree as to the existence of a mitigating circumstance before considering such circumstances in its capital sentencing deliberations?

PARTIES TO THE PROCEEDING

Respondent in this matter is Roderick Herman Frey, an inmate sentenced to death and currently held on death row in the Commonwealth of Pennsylvania.

Petitioner is Thomas A. Fulcomer, Warden of the State Correctional Institution at Huntingdon, Pennsylvania.[1]

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1. Respondent is now incarcerated in the State Correctional Institution at Greene, Pennsylvania.

TABLE OF CONTENTS

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

BRIEF IN OPPOSITION 1

COUNTER-STATEMENT OF THE CASE 1

ARGUMENT IN OPPOSITION 6

THIS COURT SHOULD DENY CERTIORARI BECAUSE THE COURT OF APPEALS PROPERLY APPLIED MILLS v. MARYLAND, McKOY v. NORTH CAROLINA, AND BOYDE v. CALIFORNIA IN FINDING THAT THE PARTICULAR INSTRUCTIONS AND VERDICT SLIP EMPLOYED IN THIS CASE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THE COMMONWEALTH WAIVED ANY ARGUMENT THAT MILLS SHOULD NOT BE RETROACTIVELY APPLIED TO THIS CASE 6

I. THE COURT OF APPEALS PROPERLY EXERCISED ITS DISCRETION IN FINDING THAT PETITIONER HAD WAIVED ANY NON-RETROACTIVITY DEFENSE TO RESPONDENT'S MERITORIOUS MILLS v. MARYLAND CLAIM BY FAILING TO RAISE THE ISSUE OF TEAGUE v. LANE DURING THE HABEAS PROCEEDINGS IN THE DISTRICT AND CIRCUIT COURTS. 6

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO RECONSIDER AS A COURT OF ERRORS THE CIRCUIT COURT'S UNANIMOUS AND CORRECT DETERMINATION THAT THE PARTICULAR JURY INSTRUCTIONS AND VERDICT SLIP EMPLOYED IN THIS CASE VIOLATED THE CONSTITUTIONAL STANDARDS SET FORTH IN MILLS v. MARYLAND, McKOY v. NORTH CAROLINA, AND BOYDE v. CALIFORNIA. 10

A. The Third Circuit Correctly Applied This Court's Settled Case Law 13

B. Other Evidence Supporting the Third Circuit's Ruling 16

C. Summary 19

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Boyde v. California, 494 U.S. 370 (1990) ..... i, 6, 10, 12, 20

California v. Brown, 479 U.S. 538 (1987) 12

Campbell v. Louisiana, 1998 WL 184478 (U.S. April 21, 1998) 6

Caspari v. Bohlen, 510 U.S. 383 (1994) 8

Collins v. Youngblood, 497 U.S. 37 (1990) 8, 9

Commonwealth v. Frey, 504 Pa. 428, 475 A.2d 700 (1984) 2

Commonwealth v. Frey, 512 Pa. 557, 517 A.2d 1265 (1986) 3

Commonwealth v. Frey, 520 Pa. 338, 554 A.2d 27 (1989) 3

Commonwealth v. Moody, 476 Pa. 223, 382 A.2d 442 (1977) 2

Commonwealth v. Tilley, 528 Pa. 125, 595 A.2d 575 (1991) 10

Eddings v. Oklahoma, 455 U.S. 104 (1982) 11

Franklin v. Lynaugh, 487 U.S. 164 (1988) 12

Frey v. Fulcomer, 132 F.3d 916 (3d Cir. 1997) 5, 13, 14, 15, 16, 17

Frey v. Fulcomer, 1991 WL 53662 (E.D. Pa. 1991) 1, 2, 4

Frey v. Fulcomer, 974 F.2d 348 (3rd Cir. 1992) 4

Furman v. Georgia, 408 U.S. 238 (1972) 11

Godinez v. Moran, 509 U.S. 389 (1993) 8

Gregg v. Georgia, 428 U.S. 153 (1976) 11

Hitchcock v. Dugger, 481 U.S. 393 (1987) 11

Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990) 14, 18

Kubat v. Thieret, 867 F.2d 351 (7th Cir. 1989) 15

Kyles v. Whitley, 514 U.S. 419 (1995) 13

Lockett v. Ohio, 438 U.S. 586 (1978) 11

Magnum Import Co. v. Coty, 262 U.S. 159 (1923) 13

Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992) 12

McKoy v. North Carolina, 494 U.S. 433 (1990) ..... i, 6, 10, 11, 12, 20

Mills v. Maryland, 486 U.S. 367 (1988) ..... i, 3, 4, 5, 6, 7, 10, 11, 12, 16, 20

Penry v. Lynaugh, 492 U.S. 302 (1989) 11

Schiro v. Farley, 510 U.S. 222 (1994) 8, 9

Skipper v. South Carolina, 476 U.S. 1 (1986) 11

Teague v. Lane, 489 U.S. 288 (1989) ..... i, 3, 4, 5, 6, 7, 8, 9

Trest v. Cain, 118 S. Ct. 478 (1997) 9

Williams v. Dixon, 961 F.2d 448 (4th Cir. 1992) 12

Zettlemoyer v. Fulcomer, 923 F.2d 284 (3d Cir. 1991) 12

Statutes

18 Pa. C. S. § 1311(d)(2) 2

28 U.S.C. § 2254 3

42 Pa. C.S. § 9711(e)(8) 2

Rules

PA. R. CRIM. P. 357 10

PA. R. CRIM. P. 358A 10

PA. R. CRIM. P. 358B 10

BRIEF IN OPPOSITION

Respondent, Roderick Herman Frey, prays that this Court deny the Petition for Writ of Certiorari, and in opposition thereto submits as follows:

COUNTER-STATEMENT OF THE CASE

This case arises out of the killing of Respondent's wife, Barbara Frey, on November 8, 1979. Mrs. Frey was actually killed by Charles Zehring and Richard Heberlig. Although Zehring came up with the idea to kill Mrs. Frey, pressured Respondent to hire him to carry out the killing, and subjected Mr. Frey to threats, harassment, and extortion to intimidate Mr. Frey from backing out of the plan, "the prosecution of the murderers of Mrs. Frey . . . produced an unusual result: the person who first cooperated with the police, confessed, and implicated others has been sentenced to death, whereas the two persons who actually committed the murder have received life sentences." *Frey v. Fulcomer*, 1991 WL 53662, at *5 (E.D. Pa. 1991).

The Zehring, Heberlig, and Frey cases were assigned to different prosecutors and scheduled for separate, simultaneous trials in adjacent courtrooms. The Heberlig and Frey cases proceeded simultaneously. However, Zehring's trial was delayed. Zehring and Heberlig waived jury sentencing and were sentenced to life imprisonment in separate bench proceedings.

On Friday, May 14, 1980, Respondent was convicted of first-degree murder. As described by the District Court, "the penalty hearing commenced almost immediately after the guilty verdict was returned, late in the afternoon." *Id.* at *6. The case was among the first to be tried under the capital sentencing scheme enacted by the Pennsylvania legislature after the

previous sentencing statute, which restricted the presentation of mitigating evidence to three enumerated mitigating circumstances[2] had been declared unconstitutional in *Commonwealth v. Moody*, 476 Pa. 223, 382 A.2d 442 (1977). The new sentencing statute permitted consideration of eight mitigating circumstances, including an open-ended mitigating circumstance permitting introduction of "any other" mitigating evidence. 42 Pa. C.S. § 9711(e)(8), 1991 WL 53662, at *5. The District Court reports that

> the penalty case was submitted to the jury at about 7:30 p.m. The trial transcript reflects no further activity until the jury verdict at 1:15 a.m. the following day . . . The parties have stipulated, however, that petitioner's counsel did indeed object to the trial judge, at about 10:30 p.m., that the jury was probably tired out, and should not be required to deliberate any longer that evening. The trial judge ruled that, since no communication had been received from the jury, their deliberations would continue. No record was made of this episode, because the court reporter was not available.

Id. at *6. The jury returned the following afternoon with a death sentence.

On April 13, 1984, the Supreme Court of Pennsylvania affirmed Respondent's conviction and sentence, *Commonwealth v. Frey*, 504 Pa. 428, 475 A.2d 700 (1984), and this Court denied certiorari. *Frey v. Pennsylvania,* 469 U.S. 963 (1984). On July 10, 198[illegible] Respondent filed a motion with the Court of Common Pleas for a new trial based upon after-discovered evidence in the form of a statement given by Zehring to Respondent's counsel on April 26, 1984. That statement had indicated that Respondent's participation in the offense

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2. *See* former 18 Pa. C. S. § 1311(d)(2) (limiting the circumstances which the jury is to consider mitigating to "the following mitigating circumstances": "(i) The age, lack of maturity, or youth of the defendant at the time of the killing. (ii) The victim was a participant in or consented to the defendant's conduct as set forth is section 1311(d) of this title or was a participant in or consented to the killing. (iii) the defendant was under duress although not such duress as to constitute a defense to prosecution under section 309 of this title (relating to duress)."

was only as a result of Zehring's threats, duress, and overwhelming domination. On September 18, 1984, the trial court denied the motion for new trial without a hearing, and the Pennsylvania Supreme Court, which treated this motion as a petition for post-conviction collateral relief, affirmed. *Commonwealth v. Frey*, 512 Pa. 557, 517 A.2d 1265 (1986), *cert. denied,* 481 U.S. 1007 (1987).

Governor Robert Casey then issued a death warrant, following which Respondent filed a petition for post-conviction relief and a request for a stay of execution in the Court of Common Pleas. In this post-conviction petition, Frey presented the claim that the jury charge at the penalty phase of his trial violated *Mills v. Maryland*, 486 U.S. 367 (1988). Although *Teague v. Lane* had already been argued before this Court, the Commonwealth did not argue that *Mills* should not be applied retroactively. On June 9, 1988, the Pennsylvania Supreme Court granted a stay of execution pending appeal, and on February 3, 1989, denied relief. *Commonwealth v. Frey*, 520 Pa. 338, 554 A.2d 27 (1989), *rearg. denied* (April 25, 1989), *cert. denied*, 494 U.S. 1038 (1990). The Pennsylvania Supreme Court reached the *Mills* claim on its merits. *See Frey,* 520 Pa. at 346-48, 554 A.2d at 30-31.

Respondent filed a petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 claim. Again, although *Teague* had already been decided, the Commonwealth made no retroactivity argument.

Following what the Third Circuit described as "an extensive evidentiary hearing," the habeas court denied Respondent's challenges to his conviction but granted the writ of habeas corpus as to sentencing because of counsel's ineffectiveness in proceeding under the wrong

statute. *Frey v. Fulcomer*, 1991 WL 53662 (E.D. Pa. 1991).[3] Given its resolution of the ineffectiveness issue, the habeas court did not reach a number of other sentencing issues presented by Frey including his *Mills* claim. A split panel of the Third Circuit reversed the issuance of the writ, ruling that counsel's performance, while deficient, was not prejudicial because the prosecution and the Court had explained to the jury the applicable law. *Frey v. Fulcomer*, 974 F.2d 348 (3d Cir. 1992), *cert. denied*, 507 U.S. 954 (1993). The Third Circuit remanded to the District Court for resolution of the remaining issues, including the *Mills* claim.

On remand, the District Court requested further briefing, including briefing on the *Mills* claim. Again, the Commonwealth failed to raise any *Teague* or nonretroactivity argument. In October 1995, after an additional hearing and supplemental briefing, the district court denied relief. Respondent appealed, raising the *Mills* claim and a number of other grounds for appeal.[4] Again, Petitioner failed to raise any *Teague* or nonretroactivity defense in its brief to the Third Circuit or in oral argument. At oral argument, Chief Judge Becker

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3. The habeas court also granted relief on the grounds that the trial court had improperly permitted the introduction in sentencing of the testimony of Sharon Bowers that was not relevant to any statutory aggravating circumstance. The Third Circuit later held that this testimony did not violate Pennsylvania law or deny Respondent due process.

4. Because the Third Circuit reversed Respondent's death sentence under *Mills*, it did not reach his claim concerning the mitigating statements made by Zehring after Frey's sentence was complete. The Court also reserved judgment on Respondent's claim that the defects and due process violations involved in the statutorily mandated proportionality review performed by the Pennsylvania Supreme Court arbitrarily denied his liberty interest, protected by the Fourteenth Amendment, in such mandatory appellate review.

directed that Respondent brief the viability or preclusion of another issue in the case,[5] and invited the Commonwealth to raise *any* issue it believed might create a procedural bar to *any* claim presented in the appeal. Respondent filed the requested brief. The Commonwealth (Petitioner now) did not respond to the court's invitation and filed no brief raising *Teague* or any other procedural-type defense.

On December 30, 1997, the Third Circuit reversed Respondent's death sentence, unanimously determining that the instruction and verdict slip employed by the trial court violated *Mills*. *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997). Only in its petition for rehearing en banc, filed after the Third Circuit had itself *expressly ruled* that a *Teague* defense had been waived, did Petitioner for the first time—after eight years of federal litigation—finally raise the issue. By a vote of 10 - 1, the Third Circuit denied Petitioner's motion for reargument en banc.

The Commonwealth now seeks certiorari review of the *Mills* claim in this Court, claiming that the Third Circuit had been "invited" to apply *Teague* in this case. It has stipulated that it will not seek to resentence Respondent—who, after eighteen years on death row is now 62 years old—to death if this Court denies certiorari or affirms the decision of the Third Circuit. *See* Petition for Certiorari, Appendix A.

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5. That issue was whether there was any procedural bar to Frey's claim that the trial court had erroneously instructed the jury that his middle age at the time of the offense could not be considered mitigating.

ARGUMENT IN OPPOSITION

THIS COURT SHOULD DENY CERTIORARI BECAUSE THE COURT OF APPEALS PROPERLY APPLIED *MILLS v. MARYLAND, McKOY v. NORTH CAROLINA,* AND *BOYDE v. CALIFORNIA* IN FINDING THAT THE PARTICULAR INSTRUCTIONS AND VERDICT SLIP EMPLOYED IN THIS CASE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THE COMMONWEALTH WAIVED ANY ARGUMENT THAT MILLS SHOULD NOT BE RETROACTIVELY APPLIED TO THIS CASE.

I. THE COURT OF APPEALS PROPERLY EXERCISED ITS DISCRETION IN FINDING THAT PETITIONER HAD WAIVED ANY NON-RETROACTIVITY DEFENSE TO RESPONDENT'S MERITORIOUS *MILLS v. MARYLAND* CLAIM BY FAILING TO RAISE THE ISSUE OF *TEAGUE v. LANE* DURING THE HABEAS PROCEEDINGS IN THE DISTRICT AND CIRCUIT COURTS.

Petitioner suggests that this case presents to this Court the question:

> Whether this Court's decision in *Mills v. Maryland*, 486 U.S. 367 (1988), constitutes a new rule of law that, pursuant to *Teague v. Lane*, 489 U.S. 367 (1988) [sic], cannot be applied retroactively to award sentencing relief to a state prisoner whose conviction became final before the new rule was announced.

Respondent, however, respectfully suggests that whether or not *Mills* announced any new rule of law is irrelevant in this case. Petitioner has waived the *Teague* defense by failing to raise it in any court despite numerous opportunities to do so. *See Frey v. Fulcomer*, 132 F.3d 916, 920 n.4 (3d Cir. 1997). Petitioner's proposed question is not presented—and should not be decided—in this case. *See Campbell v. Louisiana*, 1998 WL 184478, at *7 (U.S. April 21, 1998).

Respondent exhausted the *Mills* issue by presenting it in his Post Conviction Hearing Act proceedings in state court. Although *Teague* was then pending before this Court, the

Commonwealth did not argue in any Pennsylvania court that *Mills* should not be applied retroactively. The Supreme Court of Pennsylvania addressed the *Mills* claim on the merits, and did not rely on any non-retroactivity analysis.

Respondent then presented his *Mills* claim to the District Court. Petitioner did not raise any nonretroactivity defense in its answer or briefs to the District Court even though *Teague* had already been decided. After remand to the District Court for disposition of the issues not decided in the court's first habeas decision, Respondent continued to assert his *Mills* claim. Again, despite the opportunity for further briefing and argument, Petitioner did not make any attempt to present any *Teague* defense.

Petitioner also failed to argue *Teague* before the Court of Appeals for the Third Circuit. Although Respondent prominently discussed the *Mills* issue in his appellate brief, Petitioner (then Appellee) did not argue in its brief that *Mills* constituted a new rule of law that should not be retroactively applied. In addition, Petitioner never asserted any *Teague* defense to the *Mills* claim during the extended oral argument before the Third Circuit on this issue, and Petitioner again failed to assert this argument despite an invitation from Chief Judge Becker to provide supplemental briefing on any procedural issue that it believed might be present in this case.[6]

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6. In the Certiorari petition, Petitioner asserts that the Third Circuit somehow declined the State's "invitation" to address *Teague* in this case. This suggestion is peculiar, given that Petitioner's supposed "invitation" was never extended to the Court of Appeals until its request for reargument en back, *after* the Circuit panel had unanimously granted relief on the merits of the *Mills* claim and ruled that the Commonwealth had waived *Teague* by consistently failing to raise *Teague* before any federal court. Such an invitation — like an invitation to a dance after the band has played and the guests have gone home — is no invitation at all. Petitioner had more than eight years to raise *Teague* in four different courts and did not do so. Circuit courts need not adjudicate afterthoughts, and the en banc court's 10-1 decision not to do so here was well within its discretion.

To even reach Petitioner's question, this Court would first have to make the non-retroactivity principle embodied in *Teague* jurisdictional and mandate that the United States Court of Appeals, in reviewing habeas corpus decisions, *sua sponte* determine whether a constitutional claim for which a habeas petitioner is entitled to relief on the merits is barred under *Teague*. Consequently, the question actually presented in this case is:

> Whether the United States Court of Appeals, reviewing a district court's habeas corpus decision, must *sua sponte* raise and decide whether a constitutional violation for which a habeas petitioner is entitled to relief on the merits constitutes a new rule of law under *Teague v. Lane*, 489 U.S. 288 (1989), where the State has waived the *Teague* non-retroactivity defense by failing to raise it in its briefs or in oral argument in the Court of Appeals?

The answer to *this* question is a simple and straightforward "no." *See, e.g., Schiro v. Farley*, 510 U.S. 222, 228-29 (1994); *Godinez v. Moran*, 509 U.S. 389, 397 n.8 (1993); *Collins v. Youngblood*, 497 U.S. 37, 41 (1990).

This answer does not require addressing any important unresolved issues of constitutional law, or even any issue as to which there is conflict among the Circuits. It is not a question that merits certiorari review. Every member of this Court has written or joined an opinion stating that the *Teague* nonretroactivity defense is *not* jurisdictional and may be waived. *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (O'Connor, J., for eight Justices); & *id.* at 397 (Stevens, J., dissenting); *see also Schiro, Godinez, Youngblood, supra.*

Similarly, this Court has unanimously determined that the Courts of Appeals are not required to *sua sponte* raise the affirmative defense of procedural default in a habeas corpus case when the State has failed to do so itself. *Trest v. Cain*, 118 S. Ct. 478, 480 (1997).

As the Court explained in *Caspari*, 510 U.S. at 389:

> A threshold question in every habeas case . . . is whether the court is obligated to apply the Teague rule to the defendant's claim. We have recognized that the nonretroactivity principle "is not 'jurisdictional' in the sense that [federal courts] . . . must raise and decide the issue sua sponte." Collins v. Youngblood, 497 U.S. 37, 41, 110 S.Ct. 2715, 2718, 111 L.Ed.2d 30 (1990) (emphasis omitted). Thus, a federal court may, but need not, decline to apply Teague if the State does not argue it. See Schiro v. Farley, ___ U.S. ___, ___, 114 S.Ct. 783, 788, 127 L.Ed.2d 47 (1994).

The State here did not argue *Teague* in its answer, briefs, or oral argument in the District Court or in its briefs or at oral argument in the Court of Appeals, and the Third Circuit—properly exercising its discretion under *Schiro* and *Caspari* -- held that any potential nonretroactivity defense had been waived. Given the Commonwealth's waiver of *Teague*, the first question proposed by Petitioner is simply not present in this case. To even consider that question, this Court would be required to abandon its consistent and unanimous determination that *Teague* and other habeas affirmative defenses can be waived, and declare that Circuit Courts are not deserving of discretion to determine the circumstances in which such a waiver may occur.

"Since a State can waive the *Teague* bar by not raising it, and since the propriety of reaching the merits of a dispute is an important consideration in deciding whether or not to grant certiorari," *Schiro*, 510 U.S. at 229, this Court should not grant certiorari to explore a habeas defense that was never asserted, never briefed, and never argued below. Moreover, this Court found *Teague* waived in *Schiro* where the State was the respondent, and therefore was "entitled to rely on any legal argument in support of the judgment below." *Id.* at 228-29. It unquestionably should not *sua sponte* raise and decide *Teague* here where the State, as Petitioner, untimely raises this defense *in opposition to* the judgment below.

This court should deny certiorari in this case.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO RECONSIDER AS A COURT OF ERRORS THE CIRCUIT COURT'S UNANIMOUS AND CORRECT DETERMINATION THAT THE PARTICULAR JURY INSTRUCTIONS AND VERDICT SLIP EMPLOYED IN THIS CASE VIOLATED THE CONSTITUTIONAL STANDARDS SET FORTH IN *MILLS v. MARYLAND, McKOY v. NORTH CAROLINA,* AND *BOYDE v. CALIFORNIA.*

Petitioner's second question essentially asks this Court to determine whether the Third Circuit appropriately applied the settled -- and uncontested -- law set forth by this Court in *Mills v. Maryland*, *McKoy v. North Carolina,* and *Boyde v. California* to the facts of this case. At its core, Petitioner asks this Court to act as a court of errors, to review the unanimous decision of the panel below applying this law to the jury instructions and verdict slip employed in this case.[7]

The constitutional principles implicated in this case are well established and have not been challenged by Petitioner. This Court has written:

> It is beyond dispute that in a capital case the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. . . . The corollary that the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence is equally well established.

Mills v. Maryland, 486 U.S. 367, 374-75 (1988) (citations, emphasis, and internal quotation

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8. On February 1, 1989, the Supreme Court of Pennsylvania adopted Rules 357, 358A and 358B of the Pennsylvania Rules of Criminal Procedure (effective July 1, 1989), specifically designed to "provide statewide, uniform jury and judge sentencing verdict slips in death penalty cases." *Comment* to PA. R. CRIM. P. No. 357; *see also Commonwealth v. Tilley*, 528 Pa. 125, 143 n. 11, 595 A.2d 575, 583 n. 11 (1991) ("this rule was simply designed to provide statewide, uniform sentencing verdict slips in death penalty cases"). Under these rules, a verdict slip such as the one employed in this case is not in use anywhere in the Commonwealth of Pennsylvania.

marks omitted); *McKoy v. North Carolina*, 494 U.S. 433, 439-43 (1990); *see also Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). In *Mills* and *McKoy*, this Court explained that requiring the jury to unanimously agree as to the existence of mitigating circumstance may prevent some jurors from considering and giving effect to factors that those jurors believe could justify imposing a life sentence. This burdening of the jury's ability to give effect to mitigating circumstances violates fundamental constitutional principles, and the error necessitates a new sentencing hearing. *McKoy*, 494 U.S. at 439-44; *Mills*, 486 U.S. at 374-76; *Penry*, 492 U.S. at 319.

In addition, the prospect of a hold-out juror preventing the imposition of a life sentence violates the central Eighth Amendment principle that a capital sentencing scheme may not be arbitrary and capricious. *See generally Furman v. Georgia*, 408 U.S. 238 (1972) (multiple opinions); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion). As Justice Kennedy explained in his concurring opinion in *McKoy:*

> The [*Mills*] Court stated: "The possibility that a single juror could block [consideration of a mitigating factor], and consequently require the jury to impose the death penalty, is one we dare not risk." 486 U.S. at 384, 108 S.Ct. at 1870. (emphasis added). [¶] Application of the death penalty on the basis of a single juror's vote is "intuitively disturbing." Id., at 374, 108 S.Ct. at 1865. More important, it represents imposition of capital punishment through a system that can be described as arbitrary or capricious. The Court in Mills described such a result as the "height of arbitrariness." Ibid. Given this description, it is apparent that the result in Mills fits within our line of cases forbidding the imposition of capital punishment on the basis of "caprice," in "an arbitrary and unpredictable fashion," or through "arbitrary" or "freakish" means.

McKoy, 494 U.S. at 453-54 (Kennedy, J., concurring) (citing *Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988); *California v. Brown*, 479 U.S. 538, 541 (1987)).

In 1990, this Court in *Boyde v. California*, 494 U.S. 370, 380 (1990), clarified the *Mills* standard by explaining that reversal was required when "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents consideration of constitutionally relevant evidence."

After careful analysis of this Court's uncontested precedents, the United States Court of Appeals for the Third Circuit unanimously held that the jury instructions and verdict slip employed in this case, viewed in the totality of the instructions in this case violated *Mills, McKoy,* and *Boyde*, finding a reasonable likelihood that the jury believed it must unanimously agree to the existence of any mitigating circumstance before considering the circumstance as a basis to spare Respondent's life. *Frey*, 132 F.3d at 920-25.

This case was rightly decided, and this Court should not grant certiorari.[8] But of equal

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8. The Petitioner suggests that *Frey* creates a conflict between the Circuits. This is difficult to fathom, given that *Frey* does not create a conflict even *within* the Third Circuit, which has separately analyzed and distinguished the different combinations of jury instructions and verdict slips that have been used in Pennsylvania. *Compare Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997) *with Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991). Petitioner finds no conflict between Third Circuit precedent prior to this case and the decisions of other circuits, and none is created where — as here — the Circuit Court consistently applies settled law to a different set of facts. The Circuit Court itself rejected the claim that *Frey* and *Zettlemoyer* are inconsistent, voting 10-1 not to reconsider this case en banc. This Court should not grant certiorari to resolve a purported, but non-existent, intracircuit conflict where the Circuit itself has made clear no conflict exists.

Finally, there would be no intercircuit conflict even had the Third Circuit not carefully distinguished between the various factual scenarios in which it has decided *Mills* claims: the various instructions and verdict slips at issue in Pennsylvania have not been employed in other states — and indeed, because of the confusion they engendered, are no longer employed even in Pennsylvania itself. The law is consistent from the other jurisdictions. When courts have employed instructions requiring juror unanimity in considering mitigating circumstances, such instructions have uniformly been held to be unconstitutional. *See Mills, McKoy*; *see also Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992); *Williams v. Dixon*, 961 F.2d 448 (4th Cir. 1992); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1110 (6th Cir. 1990) (en banc), *cert. denied*, 499 U.S. 970 (1991); *Kubat v. Theiret*, 867 F.2d 351 (7th Cir.), *cert. denied*, 493 U.S. 874 (1989).

importance, "The jurisdiction of the Supreme Court to review cases by way of certiorari was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty,* 262 U.S. 159, 163 (1923) (Taft, C.J.). This Court should not grant certiorari where—as here—the Petitioner has principally asked this Court to serve as a Court of Errors. *See Kyles v. Whitley*, 514 U.S. 419, 456 (1995) (Scalia, J., with Renhquist, C.J., Kennedy & Thomas, JJ., dissenting) ("The Court has adhered to the policy that, when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally (i.e. except in cases of the plainest error) be denied.").

A. The Third Circuit Correctly Applied This Court's Settled Case Law

Chief Judge Becker, writing for the Circuit Court, carefully described and reviewed this Court's and the Third Circuit's precedents and applied them to the particular instructions and verdict slip employed by the trial court in this case. The Third Circuit correctly determined that, in the totality of the circumstances surrounding the jury charge in this case, "it was reasonably likely that the jury could have believed that it was required to find the existence of mitigating circumstances unanimously before those circumstances could be considered in its deliberations." *Frey*, 132 F.3d at 924.

The sentencing stage instructions in *Frey* apprised the jury that it "must now decide whether this defendant should be sentenced to death or life imprisonment." N.T. 1388. The trial court then informed the jury that "*The sentence will depend upon your findings concerning aggravating and mitigating circumstances.*" *Id.* The trial court also used the collective "you" every time it referred to juror's fact-finding responsibilities.

In every subsequent instruction concerning sentencing-stage fact-finding, the trial court modified the verb "find" with the adverb "unanimously." In every subsequent instruction concerning fact-finding, the trial court used the phrase "unanimously find" as the predicate in a clause describing both aggravating and mitigating circumstances. As the Circuit Court explained:

> First and foremost, read in its entirety, the relevant portion of the jury charge emphasizes the importance of a unanimous finding, using the phrase frequently and in close proximity to—within seven words of—the mitigating circumstances clause.

Frey, 132 F.3d at 923. Consequently, the Third Circuit found that the frequent close proximity between the adverbial phrase "unanimously find" and the term "mitigating circumstance" in the instructions, and the rules of ordinary English usage and grammar, created a reasonable likelihood that the jurors "would, regardless of other qualifying language, believe that mitigating circumstances had to be found unanimously." *Id.*

This reasonable likelihood that the jury would understand the court's instructions as requiring unanimity was reinforced by other parts of the charge that the court found "were more likely to increase the confusion rather than lessen it." *Frey*, 132 F.3d at 923.

- First, the trial court never told the jury that each juror had the right to consider mitigating evidence if the jury did not find that mitigating circumstance unanimously. *Id.* at 923 n.5 (citing *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1110 (6th Cir. 1990) (en banc) ("Because the jurors in this case were told that aggravating factors had to be unanimous, but were not told exactly what role mitigating factors play, it would have been reasonable for them to assume that mitigating factors had to be found

unanimously as well.") *cert. denied*, 499 U.S. 970 (1991); *Kubat v. Thieret*, 867 F.2d 351, 373 (7th Cir.), *cert. denied*, 493 U.S. 874 (1989).

• Second, the trial court was able to distinguish between the burdens of proof applicable to aggravating and mitigating circumstances, further emphasizing its failure to do so with respect to any unanimity requirement. The trial court instructed that aggravating circumstances must be proven beyond a reasonable doubt while mitigators need be proven "only by a preponderance of the evidence[, which] is a lesser burden of proof." N.T. 1390. By failing to "stress that the different burdens that attach to aggravating and mitigating circumstances also entail different unanimity requirements," the trial court increased the likelihood that a lay jury would believe that unanimity is required, "as is typically the case when considering whether a burden of proof has been met." *Frey*, 132 F.3d at 924.

• Third, the ambiguous language in the verdict slip, while not sufficient in the Circuit Court's eyes to constitute a constitutional violation by itself, still contributed to the jury's misunderstanding of its constitutional obligations. The Circuit Court noted that the Pennsylvania Supreme Court had subsequently "adopted a uniform verdict slip for capital sentencing cases which expressly aims to eliminate the type of ambiguity at issue here." *Frey*, 132 F.3d at 924. Unlike the verdict slip here, which again emphasized unanimity with respect to aggravating circumstances but was silent concerning mitigating circumstances, the uniform verdict slip adopted in 1989 specifically distinguishes between "aggravating circumstance(s) unanimously found" and "mitigating circumstance(s) ***found by one or more of us***." *See id.* at 924 n.6

(quoting PA. R. CRIM. P. No. 358A). As it had in *Mills*, the change in the verdict slip here caused the Circuit Court "at least some concern . . . that juries could misunderstand" the prior instructions and the particular verdict slip employed in this case. *Frey*, 132 F.3d at 924 (quoting *Mills*, 486 U.S. at 382).[9]

B. Other Evidence Supporting the Third Circuit's Ruling

The Third Circuit's conclusion that the jury was misled with respect to its fact-finding obligations at sentencing contains substantial additional support beyond that addressed in its unanimous opinion. Indeed, the trial court's actions during the guilt stage of trial stressed the principle of juror unanimity and substantially increased the likelihood that the jury would believe that the sentencing stage instructions dictated unanimous mitigation fact-findings.

The jury's view of the mechanics of its sentencing-phase fact-finding obligations was unquestionably shaped by the guilt stage instructions that the jury's verdict had to be unanimous. N.T. 1323.

Juries are assumed to remember—and to follow—the instructions of the trial court, and that assumption carries special force in a case such as this in which the court provided both the guilt and sentencing stage instructions *on the same day*. The jury would have assumed that it was to treat its fact-finding obligations at both stages of trial in the same manner—as requiring unanimity—unless instructed otherwise. This would be even more true where, as here, the court's sentencing instructions incorporated the instructions it had given at the guilt stage concerning other legal concepts that were applicable at both stages of the trial. For

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[9]. The Circuit panel indicated that the use of the uniform verdict slip in other cases "may cure the defect" for which the court granted relief in *Frey*. *See Frey*, 132 F.3d at 924.

example, in the penalty phase, the court instructed on reasonable doubt as follows: "Now, the Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. I have already defined for you what reasonable doubt means in my principal charge." N.T. 1390.

Again, it is what is not said here that is significant. *Frey*, 132 F.3d at 923. The common view of lay Americans concerning trial proceedings in general is that juries collectively find facts and pass judgments. When the instructions at the guilt stage of trial ratify and reinforce that common view, there is a reasonable likelihood that (unless clearly instructed otherwise) the same jury deliberating at sentencing on the same day will apply its fact-finding obligations in the same manner. The Third Circuit has explained, in understated terms, that "[a] lay jury might plausibly conclude . . . that aggravating and mitigating circumstances must be discussed and unanimously agreed to" when the trial court's failed to "stress that the different burdens that attach to aggravating and mitigating circumstances also entail different unanimity requirements." *Frey,* 132 F.3d at 923-24. It is reasonably likely that such a jury will apply these instructions in an unconstitutional manner. That likelihood is even greater when that same lay jury

(1) has already been instructed to act unanimously in reaching a decision as to guilt or innocence, and has done so;

(2) has repeatedly heard the adjective "unanimous" used in close connection with its fact-finding obligations at sentencing; and

(3) is never informed that its common view of unanimous fact-finding, while correct as to aggravating circumstances, is wrong as to mitigation.

Neither the court nor counsel at sentencing ever explained to the jury the distinctly different fact-finding requirements that govern jury consideration of mitigating circumstances, and so the guilt stage instructions defining the jury's fact-finding obligations infused and misinformed its views of its sentencing stage responsibilities. *See Kordenbrock v. Scroggy*, 919 F.2d 1091, 1109-10 (6th Cir. 1990) (capital sentence vacated where because the "common misperception" that jury findings should be unanimous may have affected consideration of mitigating evidence), *cert. denied*, 499 U.S. 970 (1991).

Thus, heading into the sentencing phase of trial, the twelve members of the jury knew that they had an important collective duty to find the facts. They knew the jury as an entity was a collective finder of fact; and that its collective finding was to be unanimous. They knew that they had made a unanimous finding of murder of the first degree, and they had been instructed by the Court, during the penalty phase of trial, that their "verdict must be unanimous." N.T. 1390. They had no indication that fact-finding at sentencing would be different in any way from fact-finding at the guilt stage; no indication that fact-finding for aggravating circumstances would be different in any way from fact-finding for mitigating circumstances; and no inkling whatsoever that fact-finding on mitigating circumstances, different from any other fact-finding they would be called upon to perform, did not require unanimous agreement of the venire before individual jurors could give it legal effect.

Finally, the manner in which the trial court explained any differences between aggravating and mitigating circumstances also led the jury to understand (incorrectly) that the unanimity requirement applied to both types of circumstances. As discussed above, when the trial court *did* distinguish between the jury's role with respect to aggravating circumstances

and its role with respect to mitigating circumstances, it was only to tell the jury that there are *different standards of proof* for each. In differentiating between the treatment of mitigation and aggravation, the trial court commented:

> The Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt . . . . The defendant has the burden of proving mitigating circumstances ***but only by a preponderance of the evidence. This is a lesser burden of proof than beyond a reasonable doubt.***

N.T. 1390. The trial court's instructions made clear that this was a ***lesser*** fact-finding standard. Having been told once when there was a lesser standard, the jury would have expected to be informed *every other time* a lesser standard applied. The jury would also have reasonably assumed that if the trial court made no reference to any other lesser fact-finding standard—i.e., that not every juror need agree as to the existence of a mitigating circumstance—no such standard existed. As a result, the structure of the court's sentencing instruction—and the nature of its critical omission—reinforced the jury's misunderstanding of the unanimity requirement.

C. Summary

Counsel and the trial court explicitly and repeatedly informed the jury at the guilt stage that fact-finding was a collective function. The trial court then uniformly and repeatedly referred to the jury with the collective "you" in describing its sentencing-stage responsibilities, uniformly and repeatedly modified its description of the jury's fact-finding obligations at sentencing with the adverb "unanimously"; consistently applied the adverbial phrase "unanimously find" to clauses describing aggravating and mitigating circumstances; and never told the jury at any time that any juror who individually found a fact to be mitigating was permitted to weigh that mitigating circumstance against the aggravating circumstances

unanimously found, even if the jury did not unanimously find that mitigating circumstance. The court did distinguish between the treatment of aggravating and mitigating circumstances, but only with respect to the burdens of proof, further suggesting that they were to be treated alike in all other respects. Viewed in their totality, the court's instructions misled the jury into believing that it must unanimously find a particular mitigating factor before considering that factor in its sentencing determination. In so doing, the court's instructions created a "barrier to the sentencer's consideration of all mitigating evidence," *Mills,* 486 U.S. at 375, in violation of Appellant's Eighth Amendment rights.

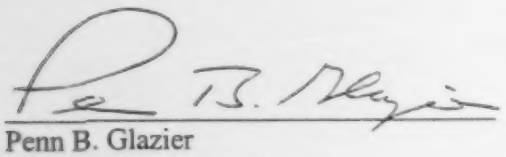
The Third Circuit properly applied *Mills, McKoy,* and *Boyde* in this case. The trial court's instructions implying that the jury must unanimously find a mitigating circumstance before it could give effect to that circumstance created a reasonable likelihood that the jury would apply the instruction in that unconstitutional manner. This clearly violated Roderick Frey's rights under the Eighth and Fourteenth Amendments to the United States Constitution, and the Court of Appeals correctly found and held that a *Mills* violation had occurred in this case.

This Court should deny certiorari in this case.

CONCLUSION

For all of the reasons presented above, the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,



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